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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1942

No. 151

FIRST TRUST & DEPOSIT COMPANY and EDITH G. BALLARD, as Executors of the Last will and Testament of WILLIAM M. BALLARD, Deceased,

Petitioners,

vs.

FRANK J. SHAUGHNESSY, Collector of Internal Revenue of the United States, for the 21st District of New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and
Associate Justices of the Supreme
Court of the United States:

First Trust & Deposit Company and Edith G. Ballard, as Executors of the Last Will and Testament of William M. Ballard, deceased, respectfully petition that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Second Circuit entered herein April 24, 1943 (R. p. 264), affirming with costs a

judgment of the District Court of the United States for the Northern District of New York entered April 18, 1942, dismissing on the merits the complaint herein pursuant to a verdict directed in favor of the defendant-respondent by the trial Judge at the conclusion of the trial (R. p. 29).

This action was brought to recover estate taxes levied and collected on property which the Commissioner of Internal Revenue had added to the gross estate as returned by the executors, on the ground that such property was to be included in the decedent's gross estate as transfers made in contemplation of death within the meaning of Section 302(c) of the Revenue Act of 1926 as amended.

Opinions Below

There was no opinion made or filed by the trial Court other than the verbal opinion appearing at pages 206-213 of the record.

The opinion of the Circuit Court is printed at pages 243-248 of the record and is reported in 134 Fed. (2d) 940. In its opinion the Circuit Court said:

> "The only question, therefore, was whether reasonable persons might have concluded from all the evidence that Ballard had not made the gift 'in contemplation of death'; although it is true that upon that issue the plaintiffs are entitled to every intendment in their favor." (R. p. 246.)

Also:

> "The condition of Ballard's health and his state of mind towards his death had nothing whatever to do with the case." (R. p. 248.)

Basis of Jurisdiction

The opinion of the Circuit Court of Appeals was filed April 8, 1943. A petition for re-hearing was filed April 20,

1943 (R. pp. 249-260). Re-hearing was denied April 21, 1943 (R. pp. 261-263). A decree affirming the judgment appealed from and ordering that a mandate issue was entered April 24, 1943 (R. pp. 264-265).

Jurisdiction is invoked under Section 240(a) of the Judicial Code as amended by the act of February 13, 1925, 43 Stat. 938 (Section 347 of Title 28, USCA).

Statute Involved

The statute involved is Section 302(c) of the Revenue Act of 1926 as amended. Said act in 1935 at the date of the death of Mr. Ballard read as follows:

> "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either along or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown

to the contrary, be deemed to have been made in contemplation of death and within the meaning of this title."

SUMMARY STATEMENT OF MATTERS INVOLVED

The Transfers in Question

On January 16, 1929, Mr. Ballard transferred nine life insurance policies on his life to City Bank Trust Company, as trustee under a typical form of unfunded life insurance trust then in general use. The trustee was to receive any dividends upon the policies and apply them in payment of the premiums, with Ballard to make up any deficiency. On his death the trustee was to collect the proceeds, hold them in trust for the benefit of his wife, Edith G. Ballard, during her life and upon her death pay the principal to his three daughters. Ballard retained no power to revoke but did retain the right to change the beneficiaries, except that he had no power to name himself as beneficiary (Exhibit 10, R. pp. 201, 217-225 and p. 244).

Some years later Ballard became concerned as to whether the reservation of the power so to change the beneficiaries might not subject the policies to an estate tax and in December, 1934, he consulted Mr. Benjamin E. Shove, one of his attorneys, who advised him that there was a chance that this might be so, owing to a change in the law made after the trust was executed (R. pp. 45, 181, 183, 244). (The Supreme Court had ruled that *Commissioner* v. *Porter*, 60 Fed. (2d) 673, affd. 288 U. S. 436, 53 S. Ct. 451, rather than *Brady* v. *Ham*, 45 Fed. (2d) 454, was the law.)

Mr. Ballard thereupon instructed his attorney to terminate the 1929 trust so that he could give the policies outright to his wife so that she would have the largest benefit of them (R. pp. 180, 182). At the end of December, 1934, he went to the offices of the First Trust & Deposit Com-

pany (successor by merger to City Bank Trust Company), got the policies, brought them home, handed them to his wife, who then put them in their safe deposit box (R. p. 197, 65).

Subsequently Mr. and Mrs. Ballard talked about her putting the policies in a trust and Mrs. Ballard, with Mr. Ballard joining her at times, gave instructions to Mr. Shove to prepare for her a new trust agreement (R. pp. 66, 68, 69, 188).

On March 26 and 27, 1935, the necessary papers were executed to terminate the 1929 trust and the policies with formal documents of transfer were delivered by Mr. Ballard to Mrs. Ballard (R. pp. 4, 185, 202, Exhibits 1-9, R. pp. 214-216).

This is the transfer the taxability of which is involved.

On March 28, 1934, Mrs. Ballard signed a trust agreement with the First Trust & Deposit Company (Exhibit 11, R. pp. 201, 225-232). Changes of the beneficiary to the trust company as trustee under such agreement were executed by Mrs. Ballard on March 28, 1935, with respect to six of the policies. Two of the policies were assigned to such trustee on April 18, 1935, and one was assigned on April 30, 1935 (R. pp. 214-216).

Under this agreement Mrs. Ballard agreed to pay all premiums, reserved the right to revoke it, to change the beneficiaries under it, to withdraw any policy and exercise any privilege reserved in the policy in favor of its "owner". On Mr. Ballard's death the trustee was to collect and invest the proceeds of the policies and pay the income and in its discretion the principal to Mrs. Ballard and at her death was to distribute the principal among her three daughters.

If she died before Mr. Ballard, the trust was to cease and the trustee was to assign the policies to Mr. Ballard (R. p. 245).

The Circuit Court of Appeals stated (1) that Mr. Ballard's termination of the 1929 trust and the transfer by Mrs. Ballard of the policies to the 1935 trust was part of a single plan (R. p. 244) and (2) that the shift from the 1929 trust to the 1935 trust was impelled only by Mr. Ballard's desire to escape the estate taxes on the policies (R. pp. 247, 248).

Mrs. Ballard paid the premiums after March, 1935 (R. pp. 71, 73).

The cash value of the policies in March, 1935, was approximately $50,000. The face amount was $130,000. Mr. Ballard's gross estate, including the life insurance less exemption, was $244,968.77 (R. p. 6).

The Donor's Health, State of Mind and Activities

The Circuit Court of Appeals in its summation of the facts said:

> "At the time of the gift Ballard was a man of 64, in active business in the City of Syracuse as a building contractor. Doctors had pronounced him in good health and he had apparently the same life expectancy —over eleven years—as any other man of his age. However, he died unexpectedly about eight months later—in November, 1935—and the amount of the policies was included in his estate upon the theory that he had made the gift in contemplation of death" (R. p. 245).

The Trial Judge in his summary of the facts said:

> "There is not any evidence in the case whereby the plaintiffs ever stated, or so far as the evidence

shows, no evidence, stated that he thought he was about to die, or soon would die, and there is not, as I recall, any evidence in the case of any actions, that is, actions, I mean in connection with the carrying on of his business, or his activities in his family, that would indicate that he had death in mind. So much for the negative part of the testimony.

The testimony of the plaintiffs in substance can be stated that the testator was about sixty-four years old, that he was the head and the dominant factor in Ballard & Company, a contracting firm; that he carried on up to the time of his death, with short intervals caused by vacations and in one or two instances sickness, the business of the Company, and in addition acted as a director and appraiser for the Bank; that his attitude toward his business was one of optimism and an attitude of planning for the future, which was shown by the fact that he at the time of his death had contracts which would not be, under the terms, finished for some time in the future" (R. p. 206).

The attorney who advised Mr. Ballard that the 1929 trust might be subject to a tax owing to a change in the law also testified on cross-examination:

"Q. Did you mention to Mr. Ballard the possibility somebody in the Treasury Department might conceivably say these policies were given in contemplation of death? A. No, I did not.

Q. You are familiar with the law which says gifts in contemplation of death are included in the decedent's estate? A. Yes, I am.

Q. You were aware that was a possibility? A. No, I wasn't aware.

Q. Of a possibility, I said? A. No, it never entered my head." (R. p. 139.)

Mr. Ballard carried on his contracting business through William M. Ballard Company (R. p. 84). Most of his work was for the New York Central. In 1934 the New York

Central was eliminating its tracks at grade in Syracuse and it was contemplated that six different contracts would be let in connection therewith, namely, contracts for the construction of the signal tower, the passenger station, the mail and service building, the towers, the maintenance and ways building and the repair shops (R. p. 121). Mr. Ballard had for some years been telling his friends, associates and family that he intended to try for all these contracts (R. pp. 90, 99, 114, 192).

On December 8, 1934, he was awarded the first of the jobs, the construction of the signal tower at Syracuse junction (R. p. 84). In May, 1935, the contract for the new passenger station was awarded to him on his bid of $451,-964.50 (R. p. 87). In September, 1934, he won on a bid of $174,943.36 the mail and service building job (R. p. 91).

Mr. Ballard was a hard worker, working all day every day and frequently at night. When preparing bids he worked every night until 10 or 11 P. M. (R. pp. 47, 115, 116).

In November, 1935, he put in a bid for the tower contract and his company was awarded the contract on this bid after he died unexpectedly on November 26, 1935 (R. p. 121).

Mr. Ballard was a member of the Trust Committee of the First Trust & Deposit Company. In 1934 he attended all the committee meetings except three; in 1935, all but four. In these two years he made 222 inspections and appraisals as a member of the Real Estate and Mortgage Committee (R. pp. 193-194).

The whole Ballard family was trust-minded. His three daughters on his advice had created educational trusts for their children, partly from moneys which he had given (R. p. 105).

Mr. Ballard was part owner of the Marsellus Lumber Company of Oneida, New York, and throughout 1934 and 1935 continued his practice of going to Oneida once or twice a week to look after his interests there (R. pp. 111-112).

In January and February of 1935 Mr. and Mrs. Ballard made their annual trip to Florida. He drove his automobile all the way, sometimes as much as 500 miles a day (R. pp. 41, 80).

In the summer of 1935 he rented for the use of his family a cottage at Cape Cod. He spent nearly every week-end there, personally driving his automobile the round trip of 700 miles. He loved Cape Cod, and planned to buy or rent a cottage for the summer of 1936 (R. pp. 38, 101, 109, 194).

Mr. Ballard was sociable, happy and jolly by nature. He was not a worrier (R. pp. 53, 103). He was cheerful on the job and had the vigor and enthusiasm of the normal man with a big job (R. p. 89). He was devoted to his wife, his daughters and grandchildren. He was a good boss, knowing all of his employees by name. In July, 1935, he encouraged his office manager to buy a home and spoke confidently of the future (R. pp. 71, 72, 114, 122).

Basis of Decision of Circuit Court

The Circuit Court of Appeals held that the transfers were made in contemplation of death, regardless of the donor's condition of health and state of mind towards his death because it held, as a matter of law, that his dominant, more important or only motive in making the gift was to save estate taxes.

The reasons for the Circuit Court of Appeals' decision as to what was the dominant motive of the donor appear in its opinion on pages 246-248 of the record.

The Circuit Court of Appeals held:

That the provisions of Mrs. Ballard's trust are to be imputed to Mr. Ballard.

That as a result of the reservations made by Mrs. Ballard in the trust created by her, a jury would have been entitled to find that Mr. Ballard expected that Mrs. Ballard might use the policies during his lifetime "either for her own benefit or perhaps to assist him if his affairs needed assistance."

That, however, until the plaintiffs showed that the donor was actuated more by the expectation that the donee would use the property during his lifetime than by the expectation that she would not use it until his death, "the very fact that the shift from the first to the second trust was impelled only by a desire to escape estate taxes, which could not fall due before he died, was nearly, if not quite, conclusive proof that the powers reserved were not deemed as important as the post mortem disposition."

"That the condition of Ballard's health and his state of mind towards his death had nothing whatever to do with the case" (p. 248).

That there was no question of fact for the jury to decide and it was right to direct a verdict.

Simply stated, the basis of the decision of the Court below was its finding that the dominant, more important, or only purpose of the donor in making the gift was to save estate taxes.

Questions Presented

(1) Whether a voluntary transfer can be held, as a matter of law, to have been made in contemplation of death without any consideration of the donor's condition of health and his state of mind towards his death.

(2) Whether a voluntary transfer can be held, as a matter of law, to have been made in contemplation of death because the dominant purpose of the donor in making the gift was to save estate taxes,

(a) Regardless of the donor's condition of health and his state of mind towards his death,

(b) In a case where the donor has given the donee the right to use the gift during the donor's lifetime and a jury would be entitled to find that the donor expected that the donee might use it either for her own benefit or perhaps to assist the donor if his affairs needed assistance.

(3) Whether a question of fact for the jury is presented upon a record which discloses

(a) that donor was in good health, in active business, optimistic, and planning for the future, 64 years of age and apparently had the same life expectancy—over 11 years—as any other man of his age;

(b) that the sole evidence as to statements made by the donor is the testimony of the donor's attorney that the donor wished to save estate taxes;

(c) that the donor modified a gift previously made which could not be used until after his death to one which could be used by the donee during his lifetime;

(d) that the Trial Court under the objection of the defendant refused to admit evidence of what the donor said to the donee about the gift (R. p. 46).

Reasons Relied on for the Allowance of the Writ

(1) The Circuit Court of Appeals has held in this case that a transfer can be held to have been made in contemplation of death within the meaning of Section 302(c) of the

Revenue Act of 1926 as amended and that the donor's condition of health and his state of mind toward his death has nothing whatever to do with the case (R. p. 248). This is a novel and startling doctrine. It is in conflict with the decision of other Circuit Courts of Appeal and with applicable decisions of this Court. See particularly, *United United States* v. *Wells*, 283 U. S. 102, 51 S. Ct. 446; *St. Louis Union Trust Company* v. *Becker* (8th Circuit), 76 Fed. (2d) 851, at page 863, affd. *Becker* v. *St. Louis Union Trust Company*, 296 U. S. 48, 56 S. Ct. 78; *Flack* v. *Holtegel* (7th Circuit), 93 Fed. (2d) 512, at page 514; *Estate of F. B. McGrew* v. *Commissioner*, decided by the Circuit Court of Appeals for the Sixth Circuit April 12, 1943, 135 Fed. (2d) 158.

(2) The Circuit Court of Appeals' decision that simply because a donor is impelled to make a gift only by a desire to escape taxes on the property transferred is, as a matter of law, made in contemplation of death, irrespective of his condition of health and his state of mind toward death, is in direct conflict with the decision of the Circuit Court of Appeals, Third Circuit, in the case of *Denniston* v. *Commissioner*, 106 F. (2d) 925.

This Court has never passed upon the question of what weight should be given to the fact that a donor desired by a particular transfer to reduce estate taxes in deciding whether the transfer was made in contemplation of death. This question has arisen in innumerable cases. Today most men and women with property are doing something to reduce their taxes—income taxes, estate taxes, other taxes —and in so doing have no thought of death in mind at all. The decision below involves a principle concerning the collection of internal revenue of far-reaching importance. The question has not been but should be settled by this Court.

(3) The petitioners do contend that on the record herein the Court should have submitted to the jury the question whether the gift was made in contemplation of death.

The questions involved are of the greatest importance to thousands of citizens.

It is common knowledge that the rich man who has retired from active business or who is in failing health consults a tax expert before he makes a gift and that there will be plenty of evidence after his death that he never mentioned estate taxes but that he did talk to many witnesses about a so-called life motive.

On the other hand, it is equally common knowledge that thousands of men of moderate wealth and in the full vigor of life make gifts to members of their families for the obvious business reason of saving estate taxes by paying a smaller gift tax and that they never bother to tell anyone about a so-called life motive.

If the decision of the Circuit Court of Appeals stands, its practical effect will be to penalize young, vigorous and healthy men who have made gifts to members of their families, who have paid gift taxes for the primary purpose of saving estate taxes and who have assumed that what they did was perfectly legal and not directly or indirectly comprehended within Section 302(c) of the Revenue Act of 1926 as amended.

Conclusion

For the foregoing reasons it is respectfully submitted that this petition should be granted.

FIRST TRUST & DEPOSIT COMPANY and
EDITH G. BALLARD, as Executors of
the Last Will and Testament of
WILLIAM M. BALLARD, Deceased.
By STEWART F. HANCOCK,
Attorney for Petitioners.

Henry S. Fraser,
Counsel for Petitioners

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Petitioners,

vs.

FRANK J. SHAUGHNESSY, Collector of Internal Revenue of the United States for the 21st District of New York,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions Below

The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported in 134 Fed. (2d) 940. It is printed at pages 243-248 of the record. The Trial Judge gave no formal opinion. His informal verbal opinion appears at pages 206 to 213 of the record.

II

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the judicial code as amended by the Act of February 13, 1925.

The opinion of the Circuit Court of Appeals was filed April 8, 1943. A petition for rehearing was filed April 20, 1943, and denied April 21, 1943. The judgment of the Circuit Court of Appeals was entered April 24, 1943.

III

Statement of the Case

A summary statement of the case is contained in the petition commencing at page 4.

IV

Specification of Errors

The Circuit Court of Appeals erred:

(1) In holding that the transfers were made in contemplation of death and that the donor's condition of health and state of mind towards his death had nothing whatever to do with the case.

(2) In holding that, irrespective of the donor's condition of health and state of mind towards his death, the transfers were made in contemplation of death merely because the donor was impelled to make the transfer only by a desire to escape estate taxes on the property given.

(3) In holding that there was no question of fact to be submitted to the jury.

V

Argument

As stated in the opinion of the Circuit Court of Appeals, the only basis for including in the gross estate of Mr. Ballard the policies which he had given to his wife was that he had transferred them to her in contemplation of death within the meaning of Section 302(c) of the Revenue Act of 1926 as amended.

The petitioners contend that no gift can be held as a matter of law to have been made in contemplation of death regardless of the donor's condition of health and his state of mind towards his death. An indispensable prerequisite to holding that a gift is made in contemplation of death is the finding that the gift was impelled by the thought of death. Always must all facts and circumstances which have a bearing on the donor's health and his state of mind towards his own death be considered before a decision can be reached whether or not the gift is made in contemplation of death. The rule enunciated by the Circuit Court of Appeals that in a contemplation of death case the donor's condition of health and his state of mind towards his death has nothing whatever to do with the case is novel and startling. Its decision holds squarely that a transfer can be held to have been made in contemplation of death, even though the donor was in no way influenced by the thought of death. Its decision is in direct conflict with decisions of this Court and other Circuit Courts of Appeals.

That the decision of the Circuit Court was based entirely upon the fact that Mr. Ballard was impelled to make the transfers only by a desire to escape estate taxes and not at all because he was impelled by any thought of death is clear from its opinion herein and from its opinion in the case of *Blakeslee* v. *Smith*, 110 Fed. (2d) 364.

In the opinion herein nothing is said about any thought of death being the impelling cause of the transfer. On the contrary, the Court expressly says: "The condition of Ballard's health and his state of mind towards his death had nothing whatever to do with the case."

In the case of *Blakeslee* v. *Smith* decided by the Circuit Court of Appeals, Second Circuit, in 1940, the transfer involved was an irrevocable trust made in 1929 by a man 73 years old. The trust provided that it should terminate at the end of 15 years or at the earlier death of the settlor and his wife; and upon its termination the principal should be paid to the settlor's six children. The income up to $75,000 a year (subsequently reduced to $25,000 a year) was to be paid by the trustee to the settlor and if he died during the 15-year term, to his wife; and any surplus income should be added to the corpus. The settlor died in 1933.

The Circuit Court in the Blakeslee case followed the decision of this Court in the case of *Colorado Bank* v. *Commissioner*, 305 U. S. 23, holding that a transfer is not made in contemplation of death simply because the dominant purpose was to make provision for the donees after the donor's death. After reviewing the evidence about the settlor's health and state of mind towards his death, the Court held that the gift was not made in contemplation of death and stated at page 366:

> "There being a substantial basis in the evidence for the finding that the settlor was actuated by considerations not flowing from the apprehension of death, the statute relied on is not applicable even though there was an intent to provide for the settlor's children after his death. *Colorado Bank* v. *Commissioner*, 305 U. S. 23, 59 S. Ct. 48, 83 L. Ed. 20; See also, *United States* v. Wells, 283 U. S. 102, 51 S. Ct. 466, 75 L. Ed. 867."

The *Blakeslee* case and the *Colorado Bank* case were cited by the petitioners in their briefs in the Circuit Court. It must, of course, be assumed that the Circuit Court did not in the case at bar intend to overrule the decision of this Court in the *Colorado Bank* case or its own decision in the *Blakeslee* case.

It follows, therefore, that the decision in the present case must rest entirely on the fact that a transfer is, as a matter of law, made in contemplation of death when the donor is impelled only by a desire to reduce estate taxes.

Petitioners submit that a transfer is not made in contemplation of death simply because the donor makes it to escape estate taxes. The statute does not impose taxes on a transfer made to reduce or escape estate taxes. The statute imposes taxes on a transfer made in contemplation of death. The fact that the gift was made to reduce estate taxes may be considered along with other relevant facts but standing alone it is not enough. Today countless persons are making transfers to reduce estate taxes with no thought of death in mind. An estate tax is just another tax. Ways of reducing it are thought of in no other light than ways of reducing other taxes. Each is a tax problem and nothing more. Along with the fact that a transfer was made to reduce estate taxes must be considered the donor's age, his condition of health, his business, social and family activities and all other facts relevant to his state of mind towards his death in order to determine whether the transfer was made in contemplation of death.

The Court's ruling that Ballard's condition of health and state of mind toward his death had nothing whatever to do with the case is contrary to United States v. Wells, 283 U. S. 102, 51 S. Ct. 447 and other cases.

In *United States* v. *Wells*, the Court said at page 115:

> "It is recognized that the reference is not to the general expectation of death which all entertain. It must be a particular concern, giving rise to a definite motive."

at page 117:

> "As a condition of body and mind that naturally gives rise to the feeling that death is near, that the donor is about to reach the moment of inevitable surrender of ownership, is most likely to prompt such a disposition to those who are deemed to be the proper objects of his bounty, the evidence of the existence or nonexistence of such a condition at the time of the gift is obviously of great importance in determining whether it is made in contemplation of death."

at page 118:

> "The words 'in contemplation of death' mean that the thought of death is the impelling cause of the transfer, and while the belief in the imminence of death may afford convincing evidence, the statute is not to be limited, and its purpose thwarted, by a rule of construction which in place of contemplation of death makes the final criterion to be an apprehension that death is 'near at hand'."

at page 119:

> "It is apparent that there can be no precise delimitation of the transactions embraced within the conception of transfers in 'contemplation of death,' as there can be none in relation to fraud, undue influence, due process of law, or other familiar legal concepts which are applicable to many varying circumstances. There is no escape from the necessity of carefully scrutinizing the circumstances of each case to detect the dominant motive of the donor in the light of his bodily and mental condition, and thus to give effect to the manifest purpose of the statute."

Becker v. *St. Louis Union Trust Co.*, 296 U. S. 48, 56, S. Ct. 78.

In this case the transfer was by a trust deed. The Commissioner sought to include it in the gross estate (1) on the ground that the transfer was intended to take effect at death and (2) on the ground that the transfer was made in contemplation of death. The judgment of the Circuit Court that the transfers were not taxable was affirmed by this Court. The Court was unanimous on the proposition that the gifts were not made in contemplation of death. In its opinion the Court summarized the evidence as to the donor's health, business activities, attitude towards death, etc. It said at page 52:

> "Evidence that the decedent was in any way influenced in what he did by the thought of death, that court (Circuit Court of Appeals, 8th Circuit) said was entirely lacking."
>
> "We are unable to find anything in the record which conflicts with the statement of the court below that evidence that the decedent was in any way influenced by the thought of death was wholly lacking."

Flack v. *Holtegel* (7th Circuit), 93 Fed. (2d) 512, at page 514:

> "The grantor must contemplate death, for such is the motive which leads to testamentary devices. The question is essentially one of the state of mind of the transferor."

Estate of F. B. McGrew v. *Commissioner* (6th Circuit, decided April 12, 1943), 135 Fed. (2d) 158:

> "Since *United States* v. *Wells*, 283 U. S. 102, it has been established law that whether a gift *inter vivos* was made in contemplation of death within the meaning of the Revenue Act depends upon the dominant motive of the donor, 'in the light of his bodily and

mental condition', to be determined in each individual case from the circumstances; and that a transfer may be in contemplation of death, even though not induced by the fear that death is 'near at hand'."

The Court's ruling that, regardless of the donor's condition of health and state of mind toward his death, the transfers were, as a matter of law, made in contemplation of death because the donor was impelled to make the transfer only by a desire to reduce estate tax is in conflict with Denniston v. Commissioner, 106 Fed. (2d) 925, Third Circuit, 1939.

Denniston v. *Commissioner*, 106 Fed. (2d) 925, reversing 38 B. T. A. 1076.

In the cited case the donor, Mrs. Denniston, had in 1915 executed a deed of trust assigning certain securities to a trustee. The income was to be paid by the trustee to the donor during her lifetime. She reserved to herself a general power to appoint by her will the disposition of the property after her death. In case of failure to exercise the power of appointment, the property after her death was to go to her five children in equal shares. All five children survived her. On March 16, 1932, when she was 75 years old she relinquished the power of appointment. In May, 1932, she gave her real estate to her daughter who simultaneously executed a declaration of trust that she held the real estate for the benefit of all five children. Mrs. Denniston died March 13, 1934. As a result of her transfers she did not leave enough property to pay the estate taxes which the Commissioner assessed. The Commissioner included in her gross estate the securities and the real estate.

The Board of Tax Appeals found on substantial evidence that one of the dominant and controlling motives for the

relinquishment of the power of appointment and the transfer of the real estate was to save her estate the burden of estate taxes.

The Circuit Court of Appeals for the Third Circuit reversed.

It is to be noted that under the trust deed the donees could not make any beneficial use of the property until after the donor's death. The Third Circuit accepted as binding on it the decision of this Court in the case of *Colorado National Bank* v. *Commissioner*, 305 U. S. 23, to the effect that the fact that the donor made it impossible for the donee to use the property until after the donor's death and expected that the donee would make no use of the property until after the donor's death, does not, standing by itself, make the gift in contemplation of death.

The Court then considered the effect of the fact that one of the dominant and controlling motives of the donor was to escape estate taxes.

The Circuit Court of Appeals stated the question as follows on page 927:

> "The question remains, however, whether the fact that a transfer was made to avoid estate tax is, without any other evidence of a motive associated with death, sufficient to support an ultimate finding or conclusion that the transfer was made 'in contemplation of death', within the meaning of Section 302 of the Revenue Act."

Its answer appears on page 928:

> "We think that because in carrying out a plan to provide for her children the donor uses a method which she thinks is best calculated to save death taxes the conveyance is not thereby conclusively stamped as 'in contemplation of death'. The desire to avoid estate

taxes may be just as clearly present in the mind of a young and vigorous donor who thinks of death as far distant as in that of one who is old and feeble and who looks momentarily for its coming. Standing alone it cannot be deemed conclusive of a mental state such as is contemplated by the statutory phrase 'contemplation of death'."

* * * * *

"We think that the petitioners adequately overcame the presumption in favor of the Commissioner's ruling by the uncontradicted evidence that the policy of the deceased was to divide her estate equally among her children as is shown by the trust deed executed by her nineteen years prior to her death; that at the time of the 1932 transfers she was a vigorous, robust woman with better than average health for one of her age; and that she was planning her activities for the future without any fear of failing health or impending death."

A very clear case of conflict between different Circuit Courts of Appeal is thus presented.

The decision of the Circuit Court that there was no question of fact for the jury was erroneous and contrary to the decisions of this Court.

Petitioners contend that the question for the jury was whether the gift was made in contemplation of death. This issue has always been held to be a question of fact to be decided by the trier of the facts. In deciding it all facts relative to the donor's health and state of mind towards his death are to be considered. This is the only case which the petitioners have found where the transfer has been held, as a matter of law, to have been made in contemplation of death.

In deciding this question the jury should be permitted to consider all the evidence bearing upon Mr. Ballard's health

and state of mind towards his death. It was for the jury to weigh the relative value to be given to (1) the fact that the transfer was made to reduce estate taxes and (2) the fact that the donor modified a gift previously made which could not be used until after his death to one which could be used by the donee during the donor's lifetime.

Petitioners fail to see that the fact that a donor makes a gift to reduce estate taxes is much, if any, indication of what he thinks about the date of his death or of when he expects the donee will use the property given. On the other hand, the fact that in the trust deed the donee, Mrs. Ballard, reserved the power to revoke or to withdraw gives rise to a strong inference that both Mr. Ballard and Mrs. Ballard expected that she might use the property during the former's life. The very ease with which it could have been provided that Mrs. Ballard could not use any of the property during her husband's life is warning that a Court should not conclude, as a matter of law, that he expected that she would not use it until after he died. Mrs. Ballard testified that she knew that she could sell the policies or turn them in (R. p. 70). Furthermore, the record herein shows that the Ballard family was trust-minded and that Mrs. Ballard had great faith in her husband's bank (R. pp. 45, 66, 105). The jury would have been justified in finding that such faith was the cause of her putting the policies in the 1935 trust.

It is also to be noted that evidence of what Mr. Ballard said to Mrs. Ballard about the 1935 trust and putting the policies in it were excluded by the Trial Court on objections of counsel for the taxpayer and the government (R. pp. 45, 67-68, 70, 72-73). It is error to decide cases on questions of fact (R. p. 247), where evidence on that fact has been excluded.

Simmons v. *Swan*, 11 Fed. (2d) 267, 273 U. S. 675, 275 U. S. 113.

The cited case was an action for breach of contract. The Trial Court at the close of the case directed a verdict for the defendant. The Circuit Court of Appeals affirmed. This Court granted certiorari and reversed because as stated on page 115 of 275 U. S.:

> "A short statement of the dominant facts as they might have been found seems to us sufficient to show that the plaintiff had a right to go to the jury."

Conclusion

For the foregoing reasons, it is submitted that a writ of certiorari should issue to the Circuit Court of Appeals for the Second Circuit.

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No. 163

In the Supreme Court of the United States

OCTOBER TERM, 1945

FIRST TRUST & DEPOSIT COMPANY AND [illegible]
BALLARD, AS EXECUTORS OF THE LAST WILL AND
TESTAMENT OF [illegible],
PETITIONERS,

v.

FRANK J. [illegible],
COLLECTOR OF REVENUE,
TWENTY-[illegible]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE [illegible]
CIRCUIT

BRIEF [illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 151

FIRST TRUST & DEPOSIT COMPANY AND EDITH G. BALLARD, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF WILLIAM M. BALLARD, DECEASED, PETITIONERS

v.

FRANK J. SHAUGHNESSY, COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES FOR THE TWENTY-FIRST DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court filed no formal opinion. Its discussion of the merits of the respondent's motion for a directed verdict appears in the record at pages 206 to 212. The opinion of the Circuit Court of Appeals (R. 243-248) is reported in 134 F. 2d 940.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 24, 1943. (R. 264–265.) The petition for a writ of certiorari was filed on July 7, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether certain transfers had been made by the decedent "in contemplation of death."

STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302 [as amended by Section 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680]:
>
> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—
>
> * * * * *
>
> (c) [as amended by Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516, and by Section 803 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169] To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take

effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

* * * * *

STATEMENT

The decedent, William M. Ballard, died on November 27, 1935, at the age of 65. (R. 238, 239.) The present suit was instituted by Ballard's executors to recover that portion of the estate taxes which resulted from the determination by the Commissioner of Internal Revenue that Ballard in March, 1935, had transferred nine life insurance policies in contemplation of death.

The following are the facts concerning these policies:

On January 16, 1929, Ballard executed a trust with respect to nine life insurance policies. (R. 217.) The premiums upon the policies were to be paid from the income of the trust or from cash furnished from time to time for that purpose by Ballard. Any excess income not required for premium payments was to be paid to Ballard during his life. Upon Ballard's death the proceeds of the policies were to be invested by the trustees and the income therefrom was to be paid to his wife for her life. Upon her death or upon Ballard's death, if his wife did not survive him, the proceeds were to be paid in equal shares to their daughters[1] (R. 217–220.) Ballard reserved the right to change the beneficiaries of the trust other than to designate himself as beneficiary. (R. 222.)

In December, 1934, Ballard was concerned as to whether the policies under the 1929 trust would be subject to an estate tax upon his death. He consulted his attorney who advised him that owing to changes in the law the policies would be subject to inclusion in his gross estate. (R. 181–184.) Accordingly, for the purpose of avoiding these

[1] Eight days before the 1929 trust was created the decedent executed his will leaving his entire estate (with the exception of personal items and a small legacy) in trust for the same beneficiaries and with the same interests as that provided for in the 1929 trust. (R. 204–205, 234–237.)

estate taxes and the resulting reduction in the property which would pass to his wife and daughters upon his death[2] Ballard on March 26 and 27, 1935, terminated the 1929 trust and assigned the nine policies to his wife.[3] His wife in turn on March 28, 1935, placed the nine life insurance policies in a new trust (R. 225) with provisions similar to the 1929 trust in that the income upon the proceeds was payable to her for life and upon her death the trust corpus was payable to the daughters. If she died before Ballard, the trust was to end and the policies were to revert to him absolutely. (R. 227–229.) The new trust reserved to Mrs. Ballard the right to withdraw any policy and to exercise any privilege which was reserved in favor of its "owner." (R. 226.)

---

[2] Had the insurance policies remained in the 1929 trust the proceeds would have been includible in the decedent's gross estate under Section 302 (c) as a transfer intended to take effect in possession or enjoyment at or after death, or under Section 302 (d) because of the reserved power to amend the trust. This tax would necessarily have been borne by the beneficiaries of the 1929 trust since they were also the beneficiaries under the decedent's will. (R. 234.)

[3] The termination of the 1929 trust and the assignment of the policies were accomplished as follows: On March 26, 1935, the decedent exercised the reserved right to change the beneficiaries of the 1929 trust by directing that upon his death the proceeds of the policies were to be paid to his wife. (R. 202–203.) The decedent then relinquished all further power again to change the beneficiary designations by making absolute assignments of the policies to his wife who had originally been designated as beneficiary of all the policies. R. 214–216.) been designated as beneficiary of all the policies. (R. 214–216.)

At the time of the transfer of the nine policies in March, 1935, Ballard was 64 years of age, actively engaged in his business and apparently in good health although he had had a record of serious illnesses. (R. 206–208.) He died eight months later in November, 1935.

The present suit came on for trial in the District Court before a jury. (R. 33.) The foregoing facts were introduced by stipulation and testimony. After both sides had closed, the respondent moved for a directed verdict. (R. 205.) This motion was granted and judgment entered in favor of the respondent. (R. 28, 213.) The Circuit Court of Appeals for the Second Circuit affirmed the judgment of the District Court.

ARGUMENT

The decision below is correct. It presents no conflict and there is no occasion for further review.

This Court has stated that the test of whether a transfer is made in contemplation of death is always to be found in the donor's motive and that a transfer may be in contemplation of death although the donor is not under the apprehension that death is near at hand. *United States* v. *Wells,* 283 U. S. 102, 117, 119; see also *McCaughn* v. *Real Estate Co.,* 297 U. S. 606; *Purvin* v. *Commissioner,* 96 F. 2d 929 (C. C. A. 7th), certiorari denied, 305 U. S. 626. The petitioners, as plaintiffs in the District Court, had the burden of

establishing a dominant or at least a substantial life motive for Ballard's transfer of the life insurance policies. *Smails* v. *O'Malley,* 127 F. 2d 410 (C. C. A. 8th); *McGrew's Estate* v. *Commissioner,* 135 F. 2d 158 (C. C. A. 6th); *Commonwealth Trust Co. of Pittsburgh* v. *Driscoll,* C. C. H. Federal Inheritance, Estate and Gift Tax Service, pars. 10,011, 10,016 (W. D. Pa.), affirmed per curiam, July 9, 1943, on District Court's opinion (C. C. A. 3rd) (not yet reported).[4] They failed to meet this requirement. Every indication in the record is that Ballard's dominant purpose was to provide for his family after his death. This purpose was accomplished by both the 1929 and 1935 trusts. At the time of the transfer in 1935 the nine life insurance policies had a maturity value of $130,000 but a cash surrender value of only $50,410.53. (R. 4.) Immediate enjoyment of the policies obviously was not expected. Cf. *Liebmann* v. *Hassett* (Mass.), decided June 22, 1943 (1943 Prentice-Hall, par. 62,739). The only motive disclosed for the termination of the 1929 trust and Ballard's assignment of the policies to his wife in 1935 was his desire to avoid estate taxes upon the insurance proceeds and the resulting reduction in the property passing to his

[4] This would have been petitioners' burden even if the transfer had occurred more than two years before death. *Smails* v. *O'Malley, supra.* Here the transfer occurred less than two years before death and therefore fell within the statutory presumption.

wife and daughters upon his death. This motive was concerned with circumstances surrounding Ballard's death and not with activities or purposes associated with his life. It therefore not only failed to sustain petitioners' position, but, to the contrary, served to support the Commissioner's determination that the policies had been transferred in contemplation of death. See *Farmers' Loan & Trust Co.* v. *Bowers,* 98 F. 2d 794, 796 (C. C. A. 2d), certiorari denied, 306 U. S. 648, rehearing denied, 308 U. S. 634; *Oliver* v. *Bell,* 103 F. 2d 760, 763 (C. C. A. 3rd); *Commonwealth Trust Co. of Pittsburgh* v. *Driscoll, supra.* No counterbalancing or offsetting life motive was offered by the petitioners for the jury's consideration. Cf. *Colorado Bank* v. *Commissioner,* 305 U. S. 23. Accordingly, it was proper for the District Court to enter judgment in favor of the respondent.

The petitioners assert (Pet. 12) that the decision of the Circuit Court of Appeals is in conflict with the decision of this Court in *United States* v. *Wells, supra.* This contention is based upon the sentence in the court's opinion that the condition of Ballard's health and his state of mind towards his death had nothing whatever to do with the case. (R. 248.) This statement of the court below must, of course, be read in the light of the facts in the case. Ballard expected the proceeds of the life insurance policies to be

enjoyed by his family after his death and his purpose in effecting the transfer in 1935 was to save estate taxes and thereby prevent a reduction in the property which he desired his family to enjoy upon his death. In these circumstances the testimony that Ballard was in good health was not evidence or proof of some unspecified but coexistent life motive for the transfer. The state of Ballard's health merely showed an absence of any consciousness that death was near. The apprehension of approaching death, however, is not the state of mind required to establish a transfer in contemplation of death within the meaning of the statute. *United States* v. *Wells, supra.*

The petitioners also urge (Pet. 12) that the decision of the Circuit Court of Appeals is in conflict with *Denniston* v. *Commissioner,* 106 F. 2d 925 (C. C. A. 3rd). We submit that there is no conflict. In the *Denniston* case the Circuit Court of Appeals for the Third Circuit concluded that a desire to save estate taxes was not conclusive of a mental state such as is contemplated by the statutory phrase "contemplation of death" where a coexistent motive to complete a long established policy of dividing property equally among children was also present. However, where the controlling motive for an inter vivos transfer was the transferor's desire to escape the payment of estate taxes the Third Circuit has agreed that the transfer must be considered to have been made

in contemplation of death. In *Commonwealth Trust Co. of Pittsburgh* v. *Driscoll, supra,* the District Court so held and the Circuit Court of Appeals for the Third Circuit affirmed per curiam "for the reasons sufficiently and satisfactorily given in the opinion" of the District Court. In the case at bar no coexistent life motive was suggested. Furthermore, the Circuit Court of Appeals for the Second Circuit did not state or even imply that a desire to save estate taxes was ever conclusive evidence that a transfer had been made in contemplation of death. The petitioners erroneously assume this to have been the ruling of the Circuit Court. Rather, in accord with its prior opinion in *Farmers' Loan & Trust Co.* v. *Bowers, supra,* and in accord with the opinions of the Circuit Court of Appeals for the Third Circuit in *Oliver* v. *Bell, supra,* and *Commonwealth Trust Co. of Pittsburgh* v. *Driscoll, supra,* the Second Circuit viewed a desire to avoid estate taxes as a factor which could be taken to support a Commissioner's determination that a transfer had been made in contemplation of death. In any event a party having the burden of proving that a transfer had not been made in contemplation of death has failed where the only evidence introduced discloses that life insurance policies have been transferred for the purpose of saving estate taxes upon the proceeds of the policies at the insured's death and to prevent the consequent

reduction in the property which the transferor expected his family to enjoy only after his death.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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JULY, 1943.

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CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1942

No. 151

FIRST TRUST & DEPOSIT COMPANY and EDITH G. BALLARD, as Executors of the Last will and Testament of WILLIAM M. BALLARD, Deceased,

Petitioners,

vs.

FRANK J. SHAUGHNESSY, Collector of Internal Revenue of the United States, for the 21st District of New York,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI, UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

The contention of the petitioners that there is a conflict between the Second and Third Circuits is borne out by the argument of the respondent at pages 9 and 10 of the respondent's brief.

In *Denniston* v. *Commissioner*, 106 F. 2d 925 (C. C. A. 3d), the Circuit Court of Appeals said at page 927:

> "There was as the Board points out substantial evidence to support the findings that the decedent was motivated by the desire to avoid estate taxes and we must accept it."

Nevertheless, the Circuit Court of Appeals in the Denniston case held that the presumption in favor of the Commissioner's ruling that the gift was made in contemplation of death was overcome by evidence:

1—That there was a motive other than the desire to escape estate taxes, namely, to carry out a long established policy of dividing her estate equally among her children.

2—That she was a vigorous, robust woman with better than average health for one of her age.

3—That she was planning her activities for the future without any fear of failing health or impending death.

Evidence of the second and third grounds for the Circuit Court of Appeals' decision in the Denniston case is present in the case at bar. This is not questioned by the respondent.

Evidence of the first ground mentioned in the Denniston case is also present in the case at bar. Mr. Ballard changed a gift which he had made in 1929 under which enjoyment by the donee was postponed until his death to a form of gift under which the donee could enjoy the gift immediately.

The only argument which respondent can advance for distinction between the Denniston case and the case at bar is that the Circuit Court of Appeals has found in the case at bar that Mr. Ballard expected the proceeds of the life insurance policies to be enjoyed by his family after his

death. However, in the Denniston case, the donor by the terms of the trust agreement reserved for herself the life use of the property and her children could not have any beneficial use of the property until after the donor's death.

The Denniston case cannot be distinguished from the present case. They are in conflict.

To state the argument of the respondent's brief in a word, it is that evidence of desire to save estate taxes is conclusive evidence of contemplation of death in absence of proof of what respondent calls a "life motive" even though the evidence establishes that there is in the donor's mind "an absence of any consciousness that death is near" (respondent's brief, page 9), his doctors had pronounced him in good health and he had the same life expectancy as any other man of his age and he was in active business and optimistically planning for the future along his usual normal lines (R. 206, 245).

This, in our opinion, means that the government is contending that the evidence of desire to save estate taxes is conclusive evidence that a transfer made with such a desire is made in contemplation of death. The government expressly makes this contention when the subject matter of the gifts is insurance policies. (See bottom page 10 of respondent's brief.)

The decision of the Court below is to the same effect. Indeed, it goes even further. The Circuit Court of Appeals has held that a gift made with a desire to save estate taxes is ipso facto and as a matter of law made in contemplation of death when either (a) there is no affirmative proof from the taxpayer that the donee expected to exercise her legal rights to use the property given, or (b) the donee could not

legally use the property given during the donor's life (Record 246, 247). If such be the form and motive of the gift then the gift, the Court below holds, is as a matter of law made in contemplation of death and the donor's condition of health and his state of mind toward his death have nothing whatever to do with the case.

Such decision seems to us in conflict with the decision of the Third Circuit in the Denniston case and contrary to the decision of this Court, in *U. S.* v. *Wells*, 283 U. S. 102, and *Colorado Bank* v. *Commissioner*, 305 U. S. 23.

In the latter case the gift was by means of a trust agreement under which the donee could not legally use any of the property until after the donor's death. The gift was made because the donor wished to be sure that his children would at his death have at least the property which he placed in the trust. This Court stated:

> "The mere purpose to make provision for children after a donor's death is not enough conclusively to establish that action to that end was 'in contemplation of death.' Broadly speaking, thoughtful men habitually act with regard to ultimate death but something more than this is required in order to show that a conveyance comes within the ambit of the statute."

This Court reversed the Circuit Court which held that such a gift made in such form and with such motive was conclusively made in contemplation of death and sustained the order of the Board of Tax Appeals which had held on all the facts including the donor's condition of health and his state of mind toward his death the gift was not made in contemplation of death.

If a gift which would be non-taxable under the Colorado Bank case becomes as a matter of law taxable where there is proof of a desire to save estate taxes; if the proper rule of law is that stated by the Circuit Court of Appeals, Second Circuit, in this case rather than that stated by the Third Circuit in the Denniston case; if it is the law that a desire to save estate taxes is equivalent to contemplation of death and the condition of the donor's health and his state of mind toward his death are immaterial, then the Supreme Court should so state the law and not leave citizens and their lawyers, revenue agents and the Courts below in doubt concerning the correct rules of law.

The government cites the cases of *Farmer Loan & Trust Co.* v. *Bowers*, 98 F. 2d 794; *Oliver* v. *Bell*, 103 F. 2d 760; *Commonwealth Trust Co. of Pittsburgh* v. *Driscoll;* C. C. H. Federal Inheritance, Estate and Gift Tax Service, pars. 10,011, 10,016 (W. D. Pa.), affirmed per curiam, July 9, 1943, on District Court's opinion (C. C. A. 3rd) (not yet reported); *Liebmann* v. *Hassett* (Mass.), decided June 22, 1943 (1943 Prentice-Hall, par. 62,739).

The citation of these cases merely emphasizes the necessity of granting the present petition so that this Court may pass upon the question of what is the tax effect of a transfer made because of a desire to save estate taxes. In the case of *Moline Properties, Inc.* v. *Commissioner* decided by this Court on June 1, 1943, this Court granted certiorari "because of the volume of similar legislation in the lower Courts and because of alleged conflict of the decision below with other circuit court decisions." In the case at bar the decision below is in conflict with other circuit court decisions. There is a vast volume of similar litigation in the lower Courts. See, for example, *Turner* v. *Hassett*, 37, F.,

Supplement 996; *Estate of Robert Wetherill* v. *Commissioner*, 36 B. T. A. 1259; *Estate of John B. Waterman* v. *Commissioner*, memorandum opinion by B. T. A. entered December 12, 1941, reported in C. C. H. Board of Tax Appeals, Decision No. 12,220-D.

It is respectfully submitted that becasue the question here presented is arising and will continue to arise in innumerable cases and involves a principle concerning the collection of internal revenue of far reaching importance, and because of the conflict between different Circuit Courts of Appeals this Court should grant the petition so that it may pass upon and finally settle the question of what weight and effect should be given to the fact that a donor desired by a particular transfer to reduce estate taxes in deciding whether the transfer was made in contemplation of death.

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